

6. FAMILY-CARE LEAVE

- ▶ *Family Members*
- ▶ *Serious Health Condition*
- ▶ *Care*
- ▶ *Certification*
- ▶ *Intermittent and Reduced-Schedule Leave*

THE FMLA ALLOWS substantial time off to care for ill family members. With proper notice (see Chapter 9), up to 12 weeks of leave may be taken on a continuous, intermittent, or reduced-schedule basis. An employer may not deny or delay a request for leave because a facility is busy or because an employee's position is important.

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FAMILY MEMBERS

FMLA leave may be taken to care for a son, daughter, spouse, or parent suffering from a serious health condition.

Son or daughter. A son or daughter is a biological, adopted, or foster child, a stepchild, a legal ward, or a child for whom the employee stands *in loco parentis* (Latin for “in place of a parent”). The child must be 17 years of age or younger unless incapable of self-care (see below). An employee stands *in loco parentis* to a child if the employee provides day-to-day supervision and financial support. A legal relationship is not necessary.

Example: Nancy Bond’s 32-year-old daughter, Ellen, is in prison. Bond is caring for Ellen’s ten-year-old daughter, Pamela. If Pamela becomes seriously ill, Bond can take FMLA leave to care for her.

Adult child. An employee may take time off to care for a child older than 17 if the child is incapable of self-care because of a physical or mental disability.⁶⁸ A child is considered incapable of self-care if he or she needs assistance in three or more activities of daily living (ADLs). ADLs include dressing, bathing, cooking, eating, shopping, paying bills, using telephones, taking public transportation, and maintaining a home.⁶⁹

Under the DOL regulations, an adult child’s disability must be permanent or long lasting to qualify a parent for FMLA leave.⁷⁰ A

child afflicted with cancer, AIDS, a severe mental impairment, autism, advanced kidney failure, or suffering from a catastrophic injury meets this standard. A short-term disability does not. The First Circuit Court of Appeals says the DOL rule is too narrow and that temporary inabilities to provided for self-care—for example, a pregnant daughter confined to bed rest—can also qualify.⁷¹

Spouse. Spouse means a husband or wife as recognized by state marriage law.⁷²

Parent. Parent means a biological mother or father or an individual who stood *in loco parentis* to an employee when the employee was a child, for example, an adoptive or foster mother or father. The parent need not live in the employee's home.

Note: An employer may restrict husband-and-wife employees to a total of 12 weeks between them for the care of parents and new children within a 12-month period.⁷³ Siblings are not subject to such a rule.

SERIOUS HEALTH CONDITION

To justify a leave, an employee's child, spouse, or parent must be incapacitated by a serious health condition. As explained on pages 34–39, this term includes overnight hospitalizations, illnesses or injuries requiring medical care and lasting more than three consecutive days, chronic ailments, pregnancy and childbirth, long-term disabilities, and conditions requiring multiple treatments.

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Incapacity. A spouse or parent is incapacitated if unable to work or to take part in regular daily activities. A child is incapacitated if unable to attend school or day care.

Representative conditions. The following conditions are likely to qualify an employee for family-care leave:

- A child with pneumonia
- A child suffering from an asthma attack
- A spouse incapacitated by severe depression
- A spouse undergoing surgery
- A parent with Alzheimer's disease
- A parent who incurs a stroke or a heart attack

Minor illness. Unless the condition lasts for more than three consecutive days and requires continuing treatment by a health care provider, leave cannot be taken to care for a family member suffering from a cold, an earache, a toothache, an upset stomach, or other minor health condition.

Example: Sally Presser's three-year-old child, Beth, has chicken pox. Although Beth must be kept home from nursery school for a week, her condition does not require continuing treatment by a health care provider. Presser is not entitled to FMLA leave.

CARE

A family member must need care to trigger an employee's leave entitlement. Care means assistance with a basic need such as tak-

Word to the Wise

Some workers assume that the FMLA covers all family emergencies. This is not so. Here are some problems that do not entitle an employee to time off:

- A daycare provider calls at 7:00 a.m. to say that she cannot watch an employee's toddler.
- A father is ordered to work overtime when he must pick up his young children from school.
- A parent is called during work and told that her teenage son has been arrested.

ing medicines, preparing meals, driving to medical appointments, insuring safety, or changing dressings. Care also means psychological support and reassurance. Comforting a family member at home or in a hospital qualifies under the Act.⁷⁴

CERTIFICATION

To verify a leave request, an employer can ask for a certification from the family member's health care provider.

Contents. The certification must state that the family member has a serious health condition, the date the condition commenced, the probable duration, and the medical facts that support the opinion. The provider must also certify that the employee is needed to provide assistance with the family member's medical



or physical needs, safety, or transportation, or that the employee's presence to provide psychological comfort would be beneficial or assist in the family member's recovery. The employee can be asked to describe the care that he or

she will provide, the expected duration of the leave, and a schedule of intermittent absences or reduced hours, if known. If the family member is in a foreign country, a provider who practices in that country may fill out the form.

Second opinion. An employer that has doubts about a certification can commission a second-opinion examination. If the second provider denies the existence of a serious health condition, or a need for care, the employer can hire a third provider to "break the

tie.” The employee and the employer must choose the third-opinion provider jointly. See procedures described on pages 46–47.

INTERMITTENT AND REDUCED SCHEDULE LEAVE

An employee can reduce his or her work hours or take leave intermittently when necessary to care for a family member. Examples: a half-time schedule to care for an ill parent; a four-day schedule to take a child to therapy; recurrent time off to help a spouse undergoing cancer treatments. Wage rates and benefits must be continued.

Alternative position. An employer can temporarily transfer a worker who needs a reduced schedule or intermittent time off to a position that better suits shorter hours or recurring absences.⁷⁵ The new position must be within the employee’s qualifications and provide the same hourly rate and benefits that the employee enjoyed before the leave. When the need for time off concludes, the employee must be allowed to return to his or her original position. The transfer may not violate the union contract.



The term [care] also includes providing psychological comfort and reassurance that would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care.

— 29 CFR §825.116(a)

QUESTIONS AND ANSWERS

Hospital visit

Q. My father, who lives out-of-state, just had a stroke. He is in the hospital. Can I take FMLA leave to visit him?

A. Yes, if you will be providing physical care or psychological reassurance, or meeting with doctors to help make decisions about his medical regimen.

Depression

Q. My mother wants me to stay with her for two weeks. She is very depressed. Does this come under the FMLA?

A. Yes, if your mother is being treated by a health care provider and is incapacitated from working or taking part in regular daily activities.

ADHD

Q. My 13-year-old son is under treatment for attention deficit hyperactivity disorder (ADHD). Can I take FMLA leave during the summer to be with him?

A. Not necessarily. To qualify as incapacitated, your son must be unable to take part in the routine summer activities of a child of his age, such as swimming and riding a bicycle.⁷⁶

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Indirect care

Q. Our six-year-old son, Sam, is in the hospital. Am I entitled to leave to care for our two-year-old so that my wife can be with Sam?

A. Perhaps. In a case that dealt with similar facts, a judge ruled that the FMLA encompasses a parent's absence that is necessary to ensure care for an ill child.⁷⁷

Nervous breakdown

Q. My teenage son is in the throes of a nervous breakdown. He refuses to go to school and demands that someone be with him at all times. Can I take FMLA leave?

A. Probably, yes. Emotional illnesses being treated by a health care provider can qualify as serious. Your presence appears to be necessary for safety reasons.

Spouses working for same employer

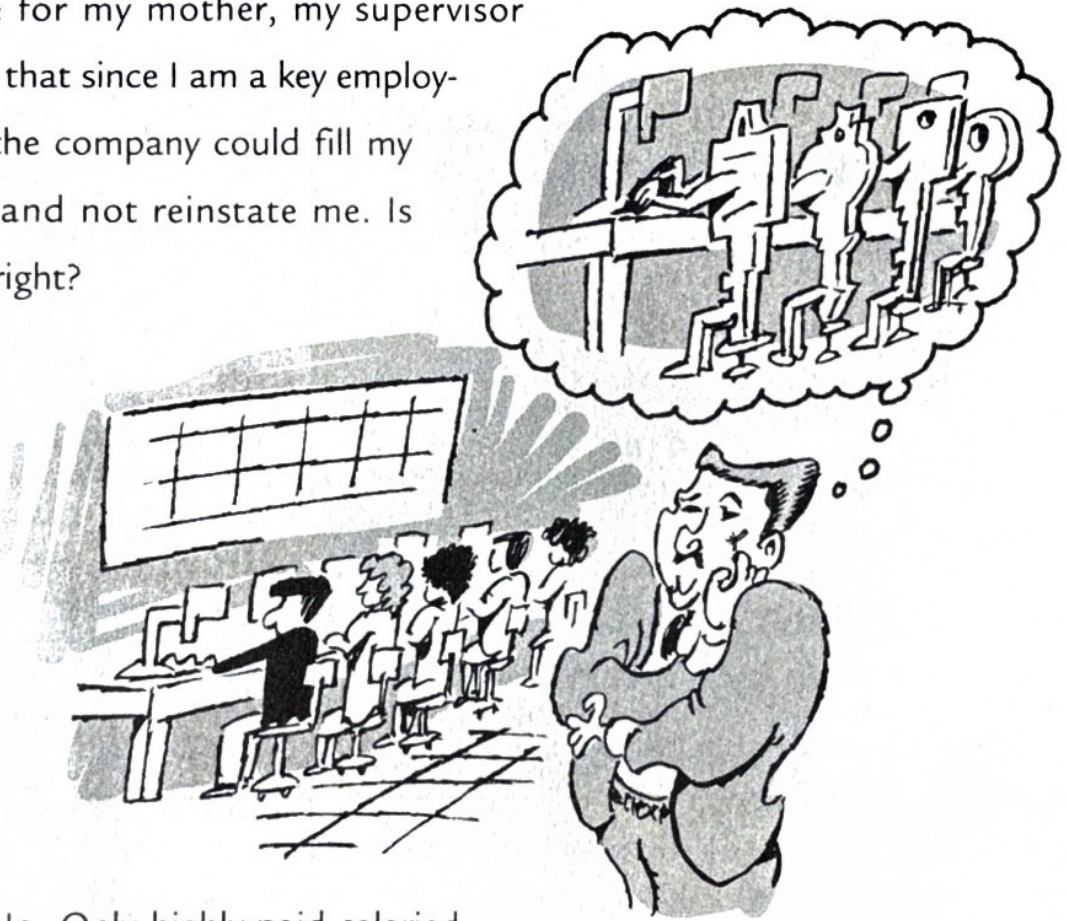
Q. My wife and I work for the same company. Our nine-year-old daughter is gravely ill. Can we each take 12 weeks off to care for her?

A. Yes. The only restrictions on spouses working for the same employer involve new-child and parent-care leaves.

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Key employee?

Q. I earn \$34 an hour as a machinist. When I asked for time off to care for my mother, my supervisor said that since I am a key employee, the company could fill my job and not reinstate me. Is she right?



A. No. Only highly-paid salaried employees can be classified as key employees. See pages 112-113.

No choice but to leave

Q. When I asked for time off after my husband's stroke, my boss said the firm was too busy for me to stop work. If I stay home anyhow, can I be fired for abandoning my job?

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A. Not legally. A worker wrongly denied FMLA leave may not be punished for unilaterally exercising his or her time-off rights.⁷⁸

Filling in

Q. My sister takes care of our severely disabled father. She needs a vacation. Can I fill in for her?

A. Yes. FMLA leave can be taken to substitute for a regular caregiver.

Surveillance

Q. While a worker was on leave to care for her child, a supervisor saw her drinking in a local pub. Does this provide a lawful basis to fire her?

A. This depends. A caregiver can take a recreation break when her presence is not needed.⁷⁹ On the other hand, if large amounts of time are spent in this manner, the employer may be able to establish that the request for full-time leave was fraudulent.

Overkill

Q. I submitted a certification for six months of intermittent time off because of my mother's deteriorating cardiac condition. Yet every time I need to stay with her, my supervisor says I must submit a note from her physician. Is this lawful?

A. No. When a health care provider certifies a need for intermittent FMLA leave for a particular period, such as six months or a

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year, an employer may not require the employee to produce further documentation unless circumstances change significantly, the employer receives information that casts doubt on the need for leave, or the employee requests an extension.⁸⁰

Appointments

Q. My mother has emphysema. Can I take time off from work to drive her to medical appointments?

A. Yes, but you must attempt to have the appointments scheduled at times that do not cause undue disruption. You must also provide advance notice.

union pointer



I have found that a couple of problems consistently arise for workers trying to obtain FMLA coverage, especially for intermittent leave. These are: (1) doctors who do not fill out FMLA certification forms properly; and (2) management representatives who request recertifications as a means of harassment.

One thing a union can do to address these issues is to develop a fact sheet that members can give to their healthcare providers. The fact sheet should explain that incapacity means being unable to do *one* essential function of the job. The sheet should also explain that if the provider describes a condition's duration as "indefinite" or "life-long," the employer can ask for recertifications more frequently than if the provider says six months or a year.

I have also found it helpful to point out to managers that they can be held personally liable for denying a legitimate leave request. This often makes them reconsider.

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